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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re the application of:

Attorney Docket No.: 2267.398US03

Barry L. Rauwirth et al.

Application No.: 09/960,606

Examiner: Stephen J. Castellano

Filed: September 21, 2001

Group Art Unit: 3727

For: BLOW MOLDED DRUM

APPELLANT'S REPLY BRIEF UNDER 37 C.F.R. § 1.193(b)(1)

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. § 1.193(b)(1), Appellant submits the following reply to the Examiner's Answer:

**A. The Examiner's Arguments Supporting the Rejections of Claims Under 35 U.S.C. § 112
¶ 1 for Failure to Comply with the Written Description Requirement Must Fail.**

The Examiner asserts in the Examiner's Answer that "Applicant admits that there is no support in the originally filed text and drawings of the present application." Examiner's Answer, p. 4. Applicant makes no such admission. Applicant's contention all along has been that the requisite support for "single blow molding operation" is found in Hammes '122, which is fully incorporated by reference in the present application. As previously pointed out, the Manual of Patent Examining Procedure makes clear that information incorporated by reference "is as much a part of the application as filed as if the text was repeated in the application, and should be treated as a part of the text of the application as filed." M.P.E.P. 2163.07(b). Since support for the referenced limitation is found in Hammes '122, then it is found in the "originally filed text" of the application, contrary to the assertions of the Examiner.

The Examiner persists in the argument that “single blow molding operation” is not supported by Hammes ‘122. The Examiner’s argument is based first on the observation that the specific word “single” is not used in Hammes ‘122 to refer to the process. Applicant responds by pointing out that this alone is of no import, since again, claimed subject matter need not be described using the precise claim words in order to satisfy the written description requirement. Rather, the description must simply indicate to persons skilled in the art that as of the application date the applicant had invented what is now claimed. Eiselstein v. Frank, 52 F.3d 1035, 1038 (Fed. Cir. 1995).

The Examiner further argues, however, that in Hammes ‘122 the process “is not describe[d] as a single, only, or exclusive process.” To support this argument, the Examiner characterizes a passage of Hammes ‘122 found at column 2, lines 21-27 as describing “a process of at least two steps in the molding operation wherein a step of blowing to form and [sic] intermediate form of the chimes occurs first, then after blowing, movable parts of the mold are displaced relative to stationary parts to complete the chime.” Contrary to the Examiner’s argument and characterization of the cited passage, however, the actual language of Hammes ‘122 provides written description support for Applicant’s claims.

The phrase “molding operation” which the Examiner uses to characterize the process recited in the passage, simply does not appear in the passage at all. Moreover, the passage does not specifically describe any “operation” at all having two separate “steps.” What it does literally describe is a “blowing operation”, which it refers to in the same passage not once but twice in the singular sense:

In accordance with the present invention, the thermoplastic parison or tubular member is blown into a mold to form a closed head drum, and

during this operation an intermediate form of the roller chimes is produced and, after the blowing operation, movable parts of the mold are displaced relative to stationary parts, in the axial direction of the drum body, to complete the chimes.

Hammes '122, col. 2, ll. 21-27 [emphasis added]. One reading this passage is left with the distinct impression that there is but one (a "single") "blowing operation" in the method described in Hammes '122. The remainder of Hammes '122 says nothing to contradict this impression, never anywhere suggesting that there may be multiple "blowing operations" involved in the described process.¹ In that the described "blowing operation" occurs into a mold, Applicant submits that it is fairly characterized as a "blow molding operation", and since there is only one blowing operation that is ever referred to, it is fairly characterized as being a "single blow molding operation." Based on the foregoing, Applicant respectfully submits that, contrary to the arguments of the Examiner, Hammes '122 provides more than adequate support for a claim element requiring "a single blow molding operation."

In closing remarks on this point, the Examiner asserts that Applicants have somewhere stated that those of skill in the art would understand "single blow molding operation" by stating "closed head drum." Examiner's Answer, p. 4. This is nothing Applicants have ever stated, and apparently springs from a fundamental misconstruction of the arguments presented on page 10 of Appellant's Brief on Appeal. We assert therein that those of skill in the art have understood Hammes '122 as teaching blow molding a closed head drum with chimes using a

¹ Tacitly admitting this to be the case, the Examiner makes the startling implication that somehow the absence of any description of multiple blowing operations proves that there is no support for a claim to a single blowing operation, since multiple blowing operations might be necessary in the process of Hammes '122 to "achieve a fully blown drum." Examiner's Answer, p. 4. Applicant can only respond by pointing out that to assume the inventors of Hammes '122 did not fully describe their invention is tantamount to assuming the patent is invalid for failure to comply with 35 U.S.C. § 112; an assumption for which there is no foundation whatsoever, and which would run afoul of 35 U.S.C. § 282 in any event.

single blow molding operation. Appellant's Brief on Appeal, p. 10. As also explained therein, this assertion is grounded in part on the characterization of Hammes '122 found in Przytulla '049, wherein the Hammes '122 process is distinguished from prior art processes where "hoops" or "rings" are formed in separate processes and welded to the remainder of the drum during blow molding. *Id.* Applicant respectfully submits that neither of these statements can logically be understood to equate "closed head drum" with "single blow molding operation" as suggested by the Examiner.

B. The Examiner's Arguments Supporting The Claim Rejections Under 35 U.S.C. § 103 Must Also Fail.

Appellant responds to the Examiner's remarks beginning on page 5 of the Examiner's Answer by noting first that the Examiner's arguments therein refer to a derivation of dimensions from "Hammes." Appellant presumes the Examiner intends to refer to McKenzie '570, not Hammes '122, and the following remarks are made with that assumption.

With regard to the substance of the arguments, the Examiner denies using the improper procedure posited in Appellant's Brief on Appeal at page 12 in order to derive dimensions from McKenzie '570 for use in the rejection of claims. The Examiner's denial is well taken. Applicants must note, however, that it was never asserted this was necessarily the procedure used by the Examiner. As explained in Appellant's Brief, it has been unclear what procedure was used to derive these dimensions due to the lack of explanation and general vagueness of the Final Office Action wherein dimensions derived somehow from McKenzie '570 were used to reject claims. The procedure described (although improper) is merely one that was suggested by the language of the claim rejection.

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The procedure used by the Examiner, as now explained in the Examiner's Answer, relies on measurements taken with a ruler from the unscaled patent drawings. It has been long settled that reading precise proportions into unscaled patent drawings is disfavored and that arguments based on such measurements are unavailing. See Nystrom v. Trex Co., Inc., 374 F.3d 1105, 1117 (Fed. Cir. 2004); Hockerson-Halberstadt, Inc. v. Avia Group International, Inc., 222 F.3d 951 (Fed. Cir. 2000); In re Wright, 569 F.2d 1124, 1127 (CCPA 1977); In re Chitayat, 408 F.2d 475 (CCPA 1969). Applicant respectfully submits that these cases are controlling precedent, and that they all but forbid the procedure used by the Examiner to derive dimensions from McKenzie '570. As a result, the arguments of the Examiner based on the derived dimensions should be disregarded. Further, Applicant respectfully submits that since McKenzie '570 offers no teaching or suggestion of the claimed proportional relationship between the fittings and top of the chime without these improperly derived dimensions, all claim rejections are unsupported and should be withdrawn.

Finally, the Examiner asserts that he did not rely on common knowledge, common sense and Official notice in making the "motivational statement" that "it would have (been obvious) to modify this height by engineering design choice as an increase in chime height creates greater overlap with the bottom of a drum stacked directly thereabove as motivated by an increase in the stability of the stack." Examiner's Answer, p. 6. This merely begs the question: What factual support in the record of this case then does the Examiner rely on for this statement? The Examiner attempts to explain that "the engineer is well versed in mechanical design and knows the correct analysis including equations and formula to use in evaluating stability, that is, the engineer is the one having ordinary skill in the art." This, however, is nothing more than an

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unsupported opinion of the Examiner. There is no affidavit or other evidence in the record that the Examiner has personal knowledge or is one of skill in the art. As previously pointed out, the Examiner has refused to cite any prior art reference to support the statement. Consequently, Applicant respectfully submits the Examiner's statement is mere unsupported opinion that should be stricken and any rejections of claims based on it withdrawn.

Conclusion

Based on the foregoing, Applicant again respectfully requests that all rejections of claims 1-15 be reversed, and urges that this case be passed to issue.

Respectfully submitted,



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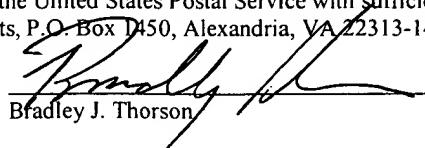
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